

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE EX REL. BRUNING V. CALIFORNIA ALT. HIGH SCH.

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STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL,
APPELLEE AND CROSS-APPELLANT,

v.

CALIFORNIA ALTERNATIVE HIGH SCHOOL, A CALIFORNIA CORPORATION,
ET AL., APPELLANTS AND CROSS-APPELLEES.

Filed April 1, 2008. No. A-07-245.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Through Attorney General Jon Bruning, the State of Nebraska sought equitable relief under Nebraska's Uniform Deceptive Trade Practices Act (UDTPA), Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 1995 & Cum. Supp. 2006), and Nebraska's Consumer Protection Act (CPA), Neb. Rev. Stat. §§ 59-1601 to 59-1622 (Reissue 2004 & Cum. Supp. 2006), against California Alternative High School (CAHS), a California corporation, Daniel A.D. Gossai, and others. Gossai appealed from the district court's final judgment, but died during the pendency of the appeal, and as to him, the action has not been revived. The State cross-appealed against CAHS, which failed to submit a brief. Because we find plain error in the district court's actions allowing Gossai, who was not an attorney admitted to practice law in Nebraska, to represent CAHS, we reverse, and remand for further proceedings.

BACKGROUND

On December 29, 2003, the State commenced this action, alleging that Gossai and CAHS violated UDTPA and CPA. The State alleged that CAHS is a California corporation and that Gossai is the owner of CAHS, as well as an officer and director of the corporation. The Attorney General alleged that Gossai and CAHS operated a facility which purportedly offered high school courses; solicited predominately Spanish-speaking individuals to enroll in courses; misrepresented to individuals that by attending classes offered once a week for 3 hours for a

10-week period, the students would obtain a high school diploma; created a false impression that at the end of the 10-week period, students did, in fact, receive an authentic high school diploma; charged individuals \$575 for the total cost of the courses; and misrepresented that upon completion of the 10-week program, students would be able to matriculate to a university or other institution of higher learning. The complaint alleged that students relied to their detriment on false promises made by Gossai and CAHS and invested their time and funds to studies that failed to yield a valid high school diploma.

On February 9, 2004, Gossai filed an answer to the State's complaint, both in his own behalf and purportedly as to CAHS. Gossai's answer admitted that CAHS is a California corporation.

On March 10, 2005, the district court entered an "Order of Permanent Injunction" against CAHS, Gossai, and another, enjoining operations of CAHS, precluding CAHS and Gossai from using certain descriptive phrases or making certain representations, and providing for a later hearing to "adduce facts regarding an award of restitution to those students who enrolled in a CAHS program." The court's order expressly stated that "Gossai represented himself, as well as the interests of [CAHS]." On March 30, Gossai filed a motion for "vacation of judgment, reconsideration and a new trial or for modification of the court's order." By a filing on April 18, the State observed that had the court's injunctive order been a final order, Gossai's motion would have been untimely as filed more than 10 days after the order, but that because the court's order was not a judgment within the meaning of Neb. Rev. Stat. §§ 25-1144.01 and 25-1329 (Cum. Supp. 2006), Gossai's motion was "not properly before the court for consideration." By an order entered on July 5, the district court overruled Gossai's motion in its entirety. On July 25, Gossai filed a notice of appeal. This court dismissed the appeal for lack of jurisdiction, relying on §§ 25-1144.01 and 25-1329.

On several days over a period of months, beginning on March 22, 2006, and concluding on October 24, the court conducted its restitution hearing. According to the court's final order, CAHS and Gossai "appeared at all times by . . . Gossai."

On February 1, 2007, the district court entered an "Order" determining the amounts of restitution attributable to various individuals purportedly damaged by the actions of CAHS and Gossai. As this document resolved all remaining claims, we refer to it as the court's judgment. The judgment granted full restitution to students "who paid money to [CAHS, Gossai, and others] in Nebraska." The court determined that for "those students who attended classes only in Iowa and paid money for those classes only in Iowa, there is insufficient contact shown in the evidence by [CAHS, Gossai, and others] to the State of Nebraska and no recovery in those instances will be allowed." The court imposed the award of restitution and an additional fine for civil penalties only upon Gossai and CAHS. The court also required CAHS and Gossai to pay the costs of the action. On March 2, Gossai timely appealed.

After the appeal was docketed, this court received, from a nonparty, a document notifying the court that Gossai had died. We issued an order directing the parties to show cause why the appeal should not be dismissed as moot due to Gossai's death. The State responded, alleging that it had filed a cross-appeal against CAHS prior to receiving notice of Gossai's death. After we considered the State's response, we ordered that the appeal proceed as to the appeal of CAHS

and the State's cross-appeal. We further ordered that unless revived as to Gossai, the appeal would proceed solely as to CAHS. See Neb. Rev. Stat. § 25-1405 (Reissue 1995).

The State subsequently filed its waiver of oral argument, noting that no revivor had been made as to Gossai and that CAHS had filed no brief in this court.

ASSIGNMENTS OF ERROR

As Gossai is deceased and the action has not been revived as to him, we need not recite the assignments of error asserted in his brief.

On cross-appeal, the State asserts that the district court erred in excluding the trial testimony of the Nebraska consumers who were solicited in Nebraska to attend CAHS but physically took classes in Iowa.

STANDARD OF REVIEW

Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

ANALYSIS

Abatement and Revivor.

Statutory provisions relative to abatement and revivor of actions apply to cases in the appellate courts. *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006). We review the relevant statutory provisions to determine whether the causes of action at issue abated upon Gossai's death.

Neb. Rev. Stat. § 25-1401 (Reissue 1995) states:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Further, pursuant to Neb. Rev. Stat. § 25-1402 (Reissue 1995), "[n]o action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant." The causes of action brought in this case seem to have survived Gossai's death pursuant to §§ 25-1401 and 25-1402.

The general rule is that a pending action which survives the defendant's death must be revived in the manner provided by statute. See *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). If a pending action is not revived in the manner provided by statute, such pending action has no force and effect as to any entity in whose name revivor was required. *Id.* The causes of action at issue in Gossai's appeal were not revived in the manner provided by statute after Gossai's death.

However, it appears that Neb. Rev. Stat. § 25-1403 (Reissue 1995) applies in this case. Section 25-1403 states:

Where there are several plaintiffs or defendants in an action and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers, being stated on the record.

Section 25-1403 was applied in *Schumacher v. Johanns, supra*, which is factually very similar to the instant case. In *Schumacher v. Johanns*, one of several appellants died after submission of an appeal. The remaining appellants formally notified the court of the death of the deceased appellant and stated their intention to proceed with the appeal in their names. The Nebraska Supreme Court determined that the death of one of several appellants during the pendency of the appeal did not affect its ability to reach the merits of the case. Citing § 25-1403, the Supreme Court determined that, because the rights of action and assignments of error asserted by the remaining appellants were the same as those asserted by the deceased appellant, they survived the appellant's death. The court determined that the remaining appellants were entitled to a resolution of their appeal.

In the instant case, Gossai filed an appeal and the State has cross-appealed. Although Gossai is now deceased, CAHS remains a party in the instant case. We now turn to the State's cross-appeal.

Gossai Was Not Authorized to Represent CAHS.

The State's cross-appeal against CAHS asserts that the district court erred in limiting the evidence received and the relief granted to certain students. However, we perceive a more fundamental problem with the proceedings concerning CAHS--the district court allowed Gossai, who is not an attorney and certainly not an attorney admitted to practice law in Nebraska, to represent the interests of CAHS, which is a California corporation.

Neb. Rev. Stat. § 7-101 (Reissue 1997) provides:

Except as provided in [Neb. Rev. Stat. §] 7-101.01 [(Reissue 1997)], no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he [or she] is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he [or she] has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall not apply to persons admitted to the bar under preexisting laws.

The Nebraska Supreme Court has held that proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996). Accord *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992). "It is axiomatic that a corporation cannot appear in its own person. It

must appear by a member of the bar.” *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 910 (1957).

Gossai had not been previously admitted to the bar by order of the Supreme Court of Nebraska. While Gossai was entitled to proceed to represent his own interests, he could not represent the interests of CAHS. The State alleged that CAHS was a California corporation, and Gossai admitted that it was. Gossai was never entitled to represent the interests of CAHS in this proceeding, and his attempts to do so were void.

The district court’s judgment clearly shows that Gossai represented not only his own interests, but those of CAHS. The record confirms that the court allowed him to do so. No one other than Gossai ever represented CAHS in these proceedings. Gossai asserted the objections upon which the district court declined to grant relief in some respects against CAHS. While Gossai may have been entitled to do so insofar as the action was directed against him, this appeal has not been revived as to his interests and those interests are not before us. We are concerned only with the interests of the State against CAHS. Because Gossai was improperly allowed to represent the interests of CAHS before the trial court, the trial court’s ruling, in effect, partially sustaining Gossai’s objections on behalf of CAHS cannot be separated or disregarded.

CONCLUSION

We find plain error in the district court’s actions allowing Gossai to represent the interests of CAHS. We therefore reverse the portions of the district court’s judgment declining to grant relief against CAHS and remand the proceeding to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.